

1
2
3
4
5
6
7 IN THE UNITED STATES DISTRICT COURT
8 FOR THE NORTHERN DISTRICT OF CALIFORNIA
9

10 KIMBERLY S. SETHAVANISH, on behalf) Case No. 12-2907-SC
11 of themselves and all others)
12 similarly situated,) ORDER FOR SUPPLEMENTAL
13) BRIEFING RE: STANDING
14 Plaintiff,)
15)
16 v.)
17)
18 ZONEPERFECT NUTRITION COMPANY,)
19)
20 Defendant.)
21)
22)
23)
24)
25)
26)
27)
28)

19 Now pending before the Court is Plaintiff's motion for class
20 certification. In opposition to the motion, Defendant argues that
21 this case should be dismissed for lack of standing. To establish
22 standing, Plaintiff has the burden to show: (1) "injury in fact,"
23 (2) "a causal connection between the injury and the conduct
24 complained of," and (3) that it is likely "that the injury will be
25 redressed by a favorable decision." Lujan v. Defenders of
26 Wildlife, 504 U.S. 555, 560-61 (1992) (internal quotations
27 omitted). The Court hereby Orders the parties to submit
28

1 supplemental briefing on whether Plaintiff has sustained an injury
2 in fact.

3 The Court assumes familiarity with the facts of the case. In
4 short, during the putative class period, Plaintiff purchased
5 Defendant's ZonePerfect nutrition bars for her then-fiancé, James
6 Colucci. Defendant represented that ZonePerfect nutrition bars are
7 "All Natural." Plaintiff alleges that this statement is false
8 because the nutrition bars contain synthetic ingredients.

9 Plaintiff pleads that "she paid more money for the products than
10 she would have had to pay for other nutrition bars that were not
11 all natural." ECF No. 1 ("Compl.") ¶ 8. Plaintiff also pleads
12 that "had [she] known the truth that [Defendant]'s Nutrition Bars
13 were not all natural, she would not have purchased [Defendant]'s
14 Nutrition Bars, but would have purchased another brand of nutrition
15 bar that was truly all natural or, if one was not available, would
16 have purchased other non-natural nutrition bars that were less
17 expensive." Id. At her deposition, Plaintiff testified that she
18 currently purchases another brand of nutrition bar, but she does
19 not believe that nutrition bar is all natural.

20 Based on these facts, it appears that Plaintiff cannot
21 establish injury merely by showing that she purchased a non-natural
22 nutrition bar. There is no indication that ZonePerfect nutrition
23 bars are unsafe to eat. Moreover, Plaintiff pleads that she was
24 willing to purchase non-natural nutrition bars so long as those
25 products were less expensive, and she testified that she currently
26 purchases non-natural nutrition bars. In other consumer class
27 actions, courts have held that a plaintiff can establish injury
28 merely by showing that he or she would not have bought the product

1 but for the alleged misrepresentation. See, e.g., Kwikset Corp. v.
2 Super. Ct., 51 Cal. 4th 310, 330 (Cal. 2011). In this case,
3 Plaintiff essentially concedes that she would have purchased
4 Defendant's product absent the alleged misrepresentations, so long
5 as the price was right and all-natural nutrition bar alternatives
6 were not available.

7 Plaintiff may be able to establish injury in at least two
8 ways. First, she could show that she paid a price premium for
9 ZonePerfect nutrition bars. That is, she could show that Defendant
10 was able to charge more for ZonePerfect nutrition bars by
11 representing that the products are all natural. Plaintiff's
12 expert, Gary French, opines that it is possible to calculate the
13 price difference between Defendant's nutrition bars and comparable
14 products that are not branded as all natural. French Report ¶ 19.
15 However, French has yet to perform such a calculation, and
16 Defendant's expert opines that Defendant's products are actually
17 less expensive than competing nutrition bars.¹

18 Second, Plaintiff could show that an all-natural nutrition bar
19 was available at the time she purchased Defendant's nutrition bars.
20 Plaintiff has pled that she "is willing to and has paid a premium
21 for foods that are all natural and has refrained from buying their
22 counterparts that [are] not all natural." Compl. ¶ 8. Thus,
23 Plaintiff could possibly establish that she was injured by showing
24 that Defendant's alleged misrepresentations caused her to forgo
25 purchasing another brand of nutrition bars that is all natural.

27 ¹ Plaintiff's reply brief conflates the issue of whether damages
28 can be calculated on a class-wide basis with the threshold issue of
whether she sustained an injury in fact.

1 However, Plaintiff has yet to identify a single all-natural
2 nutrition bar on the market.

3 Accordingly, the Court declines to rule on Plaintiff's motion
4 for class certification until it reviews supplemental briefing on
5 the issue of standing. The supplemental briefing shall address the
6 following issues: (1) may the Court consider standing at the class
7 certification stage (the Court presumes the answer is "yes"); (2)
8 if so, what standard must the Court use to evaluate standing at the
9 class certification stage; (3) what is Plaintiff's theory of injury
10 in fact; and (4) what evidence does Plaintiff have to support that
11 theory. Plaintiff shall submit a supplemental brief on these
12 issues within seven (7) days of the signature date of this Order.
13 Defendant may file a response to that brief seven (7) days
14 thereafter. Supplemental briefs shall not exceed ten (10) pages.

15
16 IT IS SO ORDERED.

17
18 Dated: January 27, 2014

19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT JUDGE